

**JURY TRIAL — PEREMPTORY CHALLENGES — *State v. Paleo* — Standing alone, waiver/nonuse of peremptory challenges is not sufficient to make a prima facie case of discrimination under *Batson* — Revised 3/2010**

The Arizona Supreme Court has unanimously held that the waiver of peremptory strikes during jury selection, standing alone, is not sufficient to establish a prima facie case of discrimination under *Batson*<sup>1</sup> and its progeny. *State v. Paleo*, 200 Ariz. 42, 22 P.3d 35 (2001). In *Paleo*, during jury selection, the State used only four of its six peremptory strikes, using one to strike a Hispanic juror. Because the State did not use all of its peremptory strikes, the clerk struck the two jurors at the end of the list, as required by Rule 18.5(g), Ariz. R. Crim. P. One of those two jurors was the only remaining Hispanic on the panel. Paleo challenged the State's striking the Hispanic juror; the trial court heard argument and found no discrimination. The trial court then heard argument on the issue of the juror who was automatically struck from the bottom of the list. The prosecutor explained that he had no reason to strike any juror not already struck, so he waived his two remaining peremptory strikes. The trial court denied Paleo's motion and Paleo was convicted.

On appeal, Paleo raised a *Batson* challenge, citing *State v. Scholl*, 154 Ariz. 426, 743 P.2d 406 (App. 1987), which stated, "There is no reason to differentiate between use and nonuse of peremptory challenges in determining whether the State is engaging in purposeful discrimination in its selection of jurors." *Id.* at 429, 743 P.2d at 409. Relying on *Scholl*, Paleo argued that the prosecutor's nonuse of his peremptory challenges could be discriminatory.

The Court of Appeals reversed Paleo's conviction, finding that the prosecutor's explanation of why he had not used his other peremptory strikes did not establish an affirmative race-neutral reason. However, the Arizona Supreme Court vacated the Court of Appeals' decision and held that waiver of peremptory strikes alone was insufficient to

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<sup>1</sup> *Batson v. Kentucky*, 476 U.S. 79, 91 (1986).

create an inference of discriminatory purpose. *State v. Paleo*, 200 Ariz. at 44, 22 P.3d at 37 ¶ 8.

Courts employ a three-step analysis to use in determining if a peremptory challenge has been improperly made:

- (1) The party opposing the strike must make a prima facie showing that the strike was made on the basis of race or gender;
- (2) if the requisite showing is made, the burden shifts to the one who made the strike to articulate a race-neutral or gender-neutral explanation for the strike; and
- (3) if the proponent of the strike articulates a race-neutral or gender-neutral reason for the strike, the trial court must decide whether the one who challenges the strike has carried the burden of proving purposeful discrimination.

*State v. Henry*, 191 Ariz. 283, 85-86, 955 P.2d 39, 41-42 (App. 1997). The Arizona Supreme Court found that waiver of peremptory strikes alone was insufficient to establish a prima facie showing of discriminatory purpose. The Court explained:

The goal of the juror selection process is to seat a fair and impartial jury in a non-discriminatory way. But neither party has a duty to remove jurors to ensure that members of a specific racial or gender group are seated. To find such a duty would implicate the equal protection rights of the jurors struck in favor of members of a specific group. A person's race is simply unrelated to his fitness as a juror. Our justice system cannot support a racial or gender "ranking" system, which favors seating one group over another depending on the case before the court.

*Paleo*, 200 Ariz. at 44, 22 P.3d at 37 [citations and internal quotations omitted].

However, the Court went on to note that waiving peremptory challenges, "accompanied by something more, could support a prima facie case in various circumstances," such as when a party makes discriminatory statements or when a pattern of striking members of a particular group is shown. *Id.* The Court reasoned:

Under *Batson*, the party alleging discrimination must present a prima facie case and bears the burden of persuasion. Peremptory challenges are a matter of discretion for each party and may be used, or not, for any non-discriminatory reason. Simply stating that a party did not use all of the allotted peremptory strikes does not establish a prima facie case of discrimination, even if minority jurors will not make the final list. Something beyond just waiver is required. Evidence of a discriminatory purpose driving the waiver must be presented to establish a prima facie case.

*Id.* at 45, 22 P.3d at 38. The Court vacated the Court of Appeals decision and disapproved *Scholl* to the extent that *Scholl* was inconsistent with its opinion in *Paleo. Id.*